



## Determination 2013/029

# Whether access and facilities for people with disabilities are required at a private campground at 96 Kotare Road, Wairoa

### 1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.

1.2 The parties to the determination are:

- Woodend Ventures Ltd, the owner of the property (“the applicant”), acting through its managing director
- Wairoa District Council, carrying out its duties and functions as a territorial authority or building consent authority (“the authority”).

1.3 The determination arises from a dispute about whether an ablutions block, proposed to be built as part of a campsite development on the applicant’s property, is required to comply with the provisions of the Building Code with respect to the requirements for access and facilities for people with disabilities.

1.4 I take the view that the matter to be determined<sup>2</sup> is whether section 118 applies to the proposed ablutions block and accordingly whether the proposed ablution block without access and facilities for people with disabilities will comply with the Building Code.

1.5 I note that this determination turns on whether the intended users of the ablution block are considered “members of the public” in terms of section 118 of the Act, and the use of the ablution block is restricted to individuals who have “membership rights” (refer paragraph 2.5).

### 1.6 Matters outside this determination

1.6.1 This determination considers only matters relating to the Building Act and its regulations. I have not considered any other aspects of the Act or the Building Code apart from matters relating to access and facilities for people with disabilities. I have no jurisdiction under other enactments that may apply in this case.

1.6.2 I note here that the authority has made several submissions about the adequacy of the documentation supplied in support of the building consent application, and the delays

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<sup>1</sup> The Building Act, Building Code, Compliance documents, past determinations and guidance documents issued by the Ministry are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Ministry on 0800 242 243.

<sup>2</sup> Under section 177(1)(a) of the Building Act 2004. In this determination, unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

attached to this application. It is the applicant's responsibility to provide adequate documentation with a building consent application to show how the proposed building work complies with the Building Code. It is the authority's responsibility to assess the adequacy of the application, and to request further information as needed. The authority is also responsible for managing the timelines associated with this process. These are matters between the parties and are not relevant to the matter being determined.

- 1.6.3 The authority has also made a submission about the proposal's compliance with camping ground regulations. This is not a Building Code matter and I have no jurisdiction with respect to these regulations.
- 1.7 In making my decision I have considered the submissions of the parties, the report of the independent expert commissioned by the Ministry to advise on the dispute ("the expert"), and other evidence in this matter.
- 1.8 I have forwarded a copy of this draft determination to the Office for Disability Issues ("the ODI") at the Ministry of Social Development by way of consultation under section 170 of the Act.
- 1.9 The relevant sections of the Act are set out in Appendix A

## **2. Background**

- 2.1 The ablution block is to serve a proposed campground that is part of a larger community development on the applicant's property. The development will include educational facilities and clusters of permanent houses, as well as the campground. The applicant's property is also known locally as Kotare Village.
- 2.2 Based on a scaled site plan provided by the applicant, the block is about 44m<sup>2</sup>, and will be situated in the middle of the seven campsites. The latest consent documentation, supplied by the authority, shows that it will be built of timber and steel, with earth plaster internal finishing, and will contain two replaceable drum compost toilets, a shower, two wash-hand basins, and a laundry area. The applicant has indicated that the design of the ablution block does not include provision of access and facilities to people with disabilities.
- 2.3 The applicant is in the process of developing a community land trust, which it is envisaged will own the land and lease out house sections on it to people who are members of the village's incorporated society. People wishing to live in the village will become members of the society by purchasing a lease from the community land trust, or entering into a long-term rental agreement for a house owned by the trust.
- 2.4 The purpose of the campground is to allow provisional members of the incorporated society to camp on the land and experience village life. This will enable them to be sure that they want to become full members, before they buy a lease or take up a long-term rental. The campground will have seven sites for tents or other forms of portable accommodation, a grey-water system for each site, and a shared ablutions block, which is the subject of this determination, containing a toilet, a shower and a laundry.

- 2.5 Only provisional members of the incorporated society will be provided with a campsite. To become provisional members, applicants must have expressed an interest in becoming full members of the incorporated society, passed through a vetting process, and been invited by the company to become provisional members. They will also be required to sign a memorandum of understanding
- 2.6 In January 2011, the applicant met with various officers of the authority to discuss the proposed community land trust development. The discussion covered the nature of the proposed development and the types of activities, residential and otherwise, that would occur there. Further meetings were held in September and October 2011. By this time there were several people living on the land, and the parties discussed the possibility of setting up a campground on the land and developing a new ablutions block to service it. The authority's view was that the applicant should register the proposed development as a camping ground under the Camping Ground Regulations 1985, and that the development would have to comply with these regulations.
- 2.7 A further meeting was held between the parties in November 2012 when the requirements for applying for a building consent for the proposed ablutions block for the campground were discussed. This was followed by telephone calls and email correspondence between the parties.
- 2.8 On 29 February 2012, the applicant applied for building consent: 'To construct an ablutions block, providing a shower and toilet facility for up to 25 individuals, including those with disabilities.' The authority requested further information about the application on 19 March 2012, and advised that the application would be suspended until these matters were resolved. Numerous phone calls and correspondence subsequently passed between the parties about the requirements for the proposed ablutions block.
- 2.9 On 12 October 2012, the applicant advised the authority that he intended to 'withdraw the proposed building plan and submit another one soon.' The applicant engaged an architect to help him with this process.
- 2.10 On 14 November 2012, the applicant emailed the authority asking whether the authority would 'require wheelchair access for the toilet and the shower' that formed part of the ablutions block, and stating that they were not intending to include this, 'as this is seen as a non-public facility intended for invited guests only'. The authority emailed the applicant back on the same day confirming that, 'Yes the facility will require accessibility access and to be accessible toilet and shower'.
- 2.11 The applicant then sought advice from its lawyer, and on 16 November 2013 emailed the authority to the effect that it was 'not required to provide accessibility access, because we are not admitting Members of the Public'. The authority responded on the same day, that it disagreed and that access was required as, 'What you are doing clearly requires compliance with sections 117–120 and schedule 2 of the Building Act 2004.'
- 2.12 The applicant applied for a determination, and this was received by the Ministry on 5 December 2012.

- 2.13 The applicant subsequently filed a new application for a building consent for the ablution block dated 20 December 2012. The application included plans for the block prepared by the applicant's architect, as well as supporting reports from the architect and consulting engineers. The new application did not include accessible facilities. The architect's report notes, with respect to compliance with Clause G1 of the Building Code, that 'The need to provide accessible facilities is currently with the [Ministry] for a determination.'
- 2.14 On 27 December 2012, the authority wrote to the applicant requesting further information with respect to the new application for a building consent, and advising that the application would be suspended until this information was received. The further information requested included information about the proposed ablution block's compliance with clauses D1 and G1 of the building code, and how it would provide access and facilities for people with disabilities.

### **3. The submissions**

- 3.1 With its application for a determination, the applicant provided a written submission dated 23 November 2012. The submission outlined the background to the dispute and submitted the view that in terms of section 118 of the Act the key issue is whether "members of the public" are to be admitted. The applicant contends that:
- 1 The building will not be open to members of the public
  - 2 That we will only be admitting private individuals under a private agreement based on membership rights.
  - 3 These people cannot be considered as Members of the Public thus Section 118 [of the Building Act 2004] does not apply.
- 3.2 The submission also contained information about the context of the proposed campground development; the restrictions that would apply to people using the campground; the applicant's previous correspondence about the issue with the authority; and the larger development of the residential village and Koanga Institute.
- 3.3 With its submission the applicant enclosed an aerial photograph of its property, and site plans of the proposed campground including the ablutions block.

### **3.4 The draft determination**

- 3.4.1 A draft determination was issued to the parties and the ODI for comment on 11 March 2013.
- 3.4.2 The authority did not accept the draft determination, and submitted (in summary):
- The nature of the applicants' proposed development has altered over time 'to suit their current organisational conditions' and this has led to delays. The proposal to have a campsite was not part of the initial discussions, but 'evolved to allow people onsite without dwellings'.
  - The original building consent application and plans for the campground lodged on 29 February 2013 included accessible facilities, and the authority has been clear in all subsequent discussion that these will be required.

- The information provided in support of the building consent application has been ‘scattered’ and not always ‘relevant or specific to the building proposals’. In particular, the authority has ‘had difficulty obtaining details of the facilities that the proposed ablution block will contain’; and has not received a ‘whole project concept plan’, or details of how the campground will operate and comply with regulations relating to camping grounds, including registration.
- ‘A camping ground has a classified use, “Community Service”, listed in Schedule 2 Building Act 2004 (b) (j) (z).’
- The campground will be open to the public, because
  - membership to the society is open to the public i.e. any member of the public can apply and therefore would be admitted to the camping ground. In this instance the ablution block becomes a building which the public are admitted and so must comply with section 118.
- The public have had access to, and been invited to stay on, the applicant’s property in the past. Based on this:
  - The authority disputes the campground and associated ablutions block is limited to prospective members of the incorporated society as members of the public have been invited to camp...’
- The existing facilities onsite are ‘well below standard’ and the application for a determination ‘could be viewed as a further stalling tactic’.
- The applicant has mentioned cost and time as reasons for not including accessible facilities, which are ‘not acceptable reasons’ for excluding them. Accessible composting toilets require ‘more planning’ to demonstrate building code compliance.

#### 3.4.3 With its submission the authority enclosed

- a timeline of the history of the building consent application, and the meetings, phone calls and correspondence between the parties
- a copy of the original consent documentation relating to the ablutions block
- copies of media information relating to the applicant’s property and proposed development
- copies of correspondence between the parties, including the authority’s requests for further information
- a copy of the latest, 20 December 2012, consent documentation relating to the ablutions block and the authority’s request for further information with respect to it.

#### 3.4.4 In a letter to the Ministry dated 11 April 2013, the ODI submitted that it understood the basis for the decision was technically correct. ODI referred to the applicant’s website which states ‘we wish to create a diverse community and are encouraging people with a wide range of skills, in all stages of life, to settle here’, and noted that for this to become a reality the campground, and its ablution block, would need to accommodate people ‘in all stages of life’ and that this could well include people for whom accessibility features are important. The submission concluded that ‘to not provide an accessible ablutions block seems counter to the intent of the community to welcome diversity’.

3.4.5 The applicant made no submission in response to the draft determination or the submissions received from the authority and ODI.

## 4. The expert's report

4.1 As mentioned in paragraph 1.7, I engaged an independent expert to assist me. The expert is a member of the New Zealand Institute of Architects. The expert was engaged to review the documentation and provide a report about the proposed building work. The expert provided a report on 25 February 2012 which was forwarded to the parties on 26 February.

4.2 The expert outlined the relevant sections of the Act and noted that:

- the village is a private housing community
- access and use of the campground and associated ablutions block is limited to prospective members of the incorporated society
- the ablution block does not fall under Schedule 2 (Buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies) as it is not a “public toilet” or a “public laundry”
- the selection process indicates that not all aspirant “members of the public” will be invited to become provisional members of the incorporated society. The users of the campground are provisional members of the incorporated society and not “members of the public”.

4.3 The expert also discussed the intended use as defined by the Act in regards to the use of the campground by invited guests, and possibly changes of the intended use. The expert concluded that the camping ground has a specific use related to the larger complex and that the stated use is limited or narrow in scope. The users of the campground are provisional members of the incorporated society and it cannot be said that “members of the public” would be users of the campground.

## 5. Discussion

5.1 I repeat that this determination is limited to the issue of whether the proposed ablution block is required to comply with section 118 of the Building Act 2004. I have not considered the code compliance of any other aspect of the building work, or of the larger proposed development on the applicant's property.

5.2 Section 118 of the Act reads:

### **118 Access and facilities for persons with disabilities to and within buildings**

- (1) If provision is being made for the construction or alteration of any building to which members of the public are to be admitted, whether for free or on payment of a charge, reasonable and adequate provision by way of access, parking provisions, and sanitary facilities must be made for persons with disabilities who may be expected to—
  - (a) visit or work in that building; and
  - (b) carry out normal activities and processes in that building.
- (2) This section applies, but is not limited, to buildings that are intended to be used for, or associated with, 1 or more of the purposes specified in Schedule 2.

- 5.3 I agree with applicant that the issue turns on whether the proposed ablutions block is a ‘building to which members of the public are to be admitted’. If it is, then reasonable and adequate provision needs to be made for any people with disabilities who may be expected to visit or work in the ablutions block, to enable them to carry out normal activities and processes within it. Schedule 2 lists the types of buildings that might fall within section 118, but is not exhaustive.
- 5.4 Based on the information I have been provided, it appears that the village, of which the campground forms part, is to be a private housing community whose residents will all be members of an incorporated society and intend to reside there long-term. The campground will provide temporary accommodation for provisional members of the society, so they can trial village life before they commit to full membership. They will be required to pass through a selection process and sign a memorandum of understanding before they can become provisional members and stay at the campground. There is a clear implication that not all applicants will be successful in this process, and hence not every applicant will become a provisional member.
- 5.5 As such, the campground cannot, in my opinion, be considered to be open to “members of the public”. I do not accept the authority’s submission that, because any member of the public can apply to become a member of the incorporated society the campground will be open to the public. As stated in paragraph 5.5, not every applicant will necessarily be successful. The authority has submitted that this ‘could be viewed as discrimination’, however that is not a Building Act matter and not one I can consider in this determination. I also acknowledge the ODI’s submission in respect of the applicant’s stated intent for inclusiveness in the proposed community.
- 5.6 The ablution block is intended solely for the use of people staying at the campground and who are provisional members of the incorporated society. It follows that, because the campground is not open to the public, then neither is its ablution block. I therefore conclude that no provision is required under section 118 for the block to have access and facilities for people with disabilities.
- 5.7 I note also that the block does not fall within any of the categories of buildings listed in Schedule 2, and that I disagree with the authority in this regard. The categories of building identified by the authority all state that they are open to the public, and I have found that the applicant’s proposed campground is not. Nor does the campground have any of the characteristics of the types of buildings listed in Schedule 2 to which members of the public have access. I note, by way of contrast that the educational facility (also on the applicant’s property), will be open to the public for educational and training purposes, and that the applicant has stated that it will have access and facilities for people with disabilities.
- 5.8 The authority has submitted that training is already taking place on the property and that the existing facilities are not accessible and ‘well below standard’. The authority has other avenues of enforcement open to it under the Building Act if this is the case, and it is not relevant to the matter for determination.
- 5.9 I note also that section 16 of the Act states that buildings must comply in their intended use with the functional requirements and performance criteria of the Building Code. Intended use is defined in section 7 as including ‘any reasonably foreseeable occasional use that is not incompatible with the intended use’. In the

current case, the applicant has been clear about the intended use of the campground and this does not include access by members of the public. It is foreseeable that occasionally people who are not full or provisional members of the incorporated society may stay there as guests of the society's members. I do not consider this is any different than a private householder having a guest to camp on their section. Nor is it incompatible with the intended stated use.

- 5.10 The authority has submitted that 'going on past history' it does not accept that the campground and ablutions block will not be used by members of the public. The authority may well hold this opinion, but the previous uses of the property cannot be taken as determinative of the intended uses of a camping ground and ablutions block that have yet to be developed. If in the future, the campground is opened up to the public, then the authority would be able to revisit the requirement for the ablutions block to make provision for people with disabilities, under either section 118 (for further building work or alterations) or section 115 (for a change of use) of the Act. This will be a matter for the authority to monitor and take action on as required.

## **6. Decision**

- 6.1 In accordance with section 188 of the Act, I hereby determine that section 118 does not apply to the proposed ablutions block, and accordingly the proposed ablution block complies with the requirements of the Building Code with respect to access and facilities for people with disabilities.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 20 May 2013.

John Gardiner  
**Manager Determinations and Assurance**



## Appendix A: The legislation

A.1 The relevant provisions of the Building Act include:

### 7 Interpretation

**intended use**, in relation to a building,—

(a) includes any or all of the following:

(i) any reasonably foreseeable occasional use that is not incompatible with the intended use...

### 16 Building code: purpose

The building code prescribes functional requirements for buildings and the performance criteria with which buildings must comply in their intended use.

### Schedule 2: Buildings in respect of which requirement for provision of access and facilities for persons with disabilities applies

The buildings in respect of which the requirement for the provision of access and facilities for persons with disabilities apply are, without limitation, as follows:

...

(b) public toilets wherever situated:

...

(j) hotels, motels, hostels, halls of residence, holiday cabins, groups of pensioner flats, boarding houses, guest houses, and other premises providing accommodation for the public:

...

(z) other buildings, premises, or facilities to which the public are to be admitted, whether for free or on payment of a charge.